

2017-1127

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United States Court of Appeals  
for the Federal Circuit

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John “Giovanni” Aragona,

*Appellant,*

v.

LuckyU Enterprises, Inc., dba Giovanni’s Original  
White Shrimp Truck

*Appellee.*

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*Appeal from the United States Patent and Trademark Office,  
Trademark Trial and Appeal Board Cancellation No. 92057023*

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**OPPOSITION TO APPELLANT’S MOTION TO EXTEND TIME**

Daniel P. Mullarkey  
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1401 Eye Street, NW  
Suite 800  
Washington, DC 20005  
(202) 783-3300

*Attorneys for Appellee*  
LuckyU Enterprises

FEBRUARY 28, 2017

Appellee LuckyU Enterprises, Inc. (“LuckyU”) opposes the request for extension by Appellant John Aragona (“ Mr. Aragona”) until March 14, 2017 to file his brief. As explained below, because of the delays in resolving this dispute, LuckyU opposes any extension, and LuckyU respectfully requests that no further extensions of time be given to Mr. Aragona.<sup>1</sup> LuckyU is also submitting this response to clarify the record and representations made in the Aragona Motion.

## **BACKGROUND**

This case pertains to an ownership dispute over the rights to certain trademarks, including GIOVANNI’S ORIGINAL WHITE SHRIMP TRUCK, purchased by LuckyU in 1997 from Mr. Aragona and his then wife. LuckyU has continuously used the trademarks in U.S. commerce since 1997. LuckyU has substantially grown the business purchased from Mr. Aragona through the use of the GIOVANNI’S ORIGINAL WHITE SHRIMP TRUCK trademark, among other marks. Mr. Aragona recently tried to reclaim rights to the purchased trademarks by filing for federal trademark protection and claiming LuckyU was merely a licensee. Mr. Aragona was able to obtain federal trademark rights and attempted to disrupt and cause confusion with LuckyU’s prosperous business. In 2013, LuckyU initiated a cancellation proceeding before the Trademark Trial and Appeal Board. For nearly four years this matter has been pending at the Board. Finally, on July

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<sup>1</sup> Appellee notes that it was not served with the extension request until February 21, 2017, one week after Mr. Aragona’s opening brief deadline.

25, 2016, the Trademark Trial and Appeal Board confirmed LuckyU's rights in its trademarks and ordered cancellation of Mr. Aragona's federal trademark registrations.

### **PRIOR EXTENSION REQUESTS**

Mr. Aragona, through his counsel who represented him in the PTO proceedings, first asked for an extension of time on the eve of his deadline to file a notice of appeal because of a medical procedure. (Exhibit A). The Director of the United States Patent and Trademark Office granted the thirty day (30) extension without offering LuckyU an opportunity to respond.<sup>2</sup>

Mr. Aragona filed his Notice of Appeal on the last day of the extended deadline. Shortly thereafter, on November 28, 2016, Mr. Aragona advised the undersigned counsel that he would be traveling and attending events in December and that he would not be able to file a brief until January 30, 2017. He requested LuckyU's consent to extend his deadline to January 30, 2017. Later that day LuckyU consented to his request, but asked that Mr. Aragona provide the list of appendix materials as required by FCR 30(b). Further, LuckyU asked for confirmation that Mr. Aragona was not being represented by counsel in this appeal.

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<sup>2</sup> The Trademark Trial and Appeal Board proceeding was fraught with delay and excuses by Mr. Aragona including travel related issues and "lighting striking" the computer of Mr. Aragona's counsel. These delays are detailed in LuckyU's Opposition to Respondent's Request for Extension of Time to File an Appeal. (Exhibit E)(Underlying Exhibits omitted due to space constraints).

Mr. Aragona responded that he was proceeding pro se, but he did not acknowledge the request for appendix designations. (Exhibit B).

On December 12, 2016, LuckyU again approached Mr. Aragona to discuss the appendix. LuckyU also requested confirmation if Mr. Aragona was going to formally seek extension of his deadline to file his brief. (Exhibit C). Mr. Aragona did not reply to this email until February 3, 2017.

On December 14, 2016, the certified list from the PTO was filed, and the Federal Circuit Clerk docketed the due date from Mr. Aragona's informal brief as January 9, 2017. Mr. Aragona did not file an informal brief by that deadline.

On February 3, 2017, a Friday evening, Mr. Aragona sent a new request for consent to extend his deadline to file his brief by 60-days. (Exhibit D). LuckyU Enterprises did not consent to a 60-day request for extension. LuckyU Enterprises sent its response to Mr. Aragona on Monday, February 6, 2017, one day before Mr. Aragona allegedly mailed his Motion in which he alleges that LuckyU had not yet responded. (Exhibit E). For the record, LuckyU did respond to Mr. Aragona and it did not consent to a 60-day extension.

### **LUCKYU'S POSITION REGARDING THE REQUESTED EXTENSION**

LuckyU has been severely prejudiced by the cost and expense defending its rights in the trademarks at issue. After purchasing a struggling food truck business from Mr. Aragona in 1997, LuckyU has managed to grow the business

exponentially creating a strong brand name in its GIOVANNI'S WHITE SHRIMP TRUCK trademark. The trademarks have great value to LuckyU and further delay in resolving the matter continues the uncertainty in ownership and increases the costs of continuing to defend its rights. Further delay continues to severely prejudice LuckyU.

### **FORMAL BRIEF CLARIFICATION**

Mr. Aragona advised in his email dated February 3, 2017 (Exhibit D) that he plans to file a motion under Fed. R. App. 24(c) for leave to use the original record instead of designating materials for filing an appendix. Rule 24(c) is only available if an appellant is proceeding in forma pauperis. Mr. Aragona already paid the appeal fee and this option is not available to him.

It appears Mr. Aragona may have meant he was planning to proceed under this Court's informal brief procedures. However, the deadline to file his informal brief was January 9, 2017. See FCR 31(e). This option is no longer available to Mr. Aragona and if he contends that the informal brief procedures are available, his present motion is untimely. LuckyU respectfully requests that any order granting Mr. Aragona's requested extension of time also clarify that the time periods for designating appendix materials under FCR 30(b) are not further extended.

Dated: February 28, 2017

Respectfully submitted,

/s/Daniel P. Mullarkey

Daniel P. Mullarkey  
Polsinelli PC  
1401 Eye Street, NW  
Suite 800  
Washington, DC 20005  
(202) 783-3300

*Attorneys for Appellee*  
LuckyU Enterprises, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Opposition to Appellant's Motion to Extend Time was served by first class mail to Appellant John Aragona at 17 Whitfield Avenue, Sarasota, FL 34243. A courtesy copy of the Opposition is being sent by email to [giovanni@giovannissauces.com](mailto:giovanni@giovannissauces.com)

/Daniel Mullarkey/

Daniel P. Mullarkey

# **EXHIBIT A**



The Law Offices of Jamie N. Pitts, Esq., PA  
2627 Mall Drive #105  
Sarasota FL 34231  
jnplawfirm.com

**To:** +1 (571) 273-0373  
**Company:**  
**Fax:** +1 (571) 273-0373  
**Subject:** Request for an extension of time to file an appeal for Cancellation Number: 92057023  
**Ref:** Cancellation Number: 92057023

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**From:** Jamie Pitts  
**Fax:** +1 (855) 224-7819  
**Phone:** 941-893-7751  
**Date:** 09/26/2016  
**Time:** 05:26:35 PM EST  
**Pages:** 2

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**Remarks:** To the attention of: The Office of the Solicitor At the following address: Office of the Solicitor  
Mail Stop 8 U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, Virginia 22313-1450

This facsimile, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender and destroy all copies of the original message.

THE LAW OFFICE OF JAMIE N PITTS  
887 WEST MARIETTA STREET NW, SUITE M105  
ATLANTA, GA 30318  
jamiempitts@jnpilawfirm.com  
Phone: 941-893-7751  
Fax: 855-224-7819

Monday, September 26, 2016

*Sent Via US Mail:*  
Office of the Solicitor  
Mail Stop 8  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
*Sent Via Fax: 571-273-0373*

Re: Request for an extension of time to file an appeal for Cancellation Number: 92057023

Dear Director:

We are counsel to John "Giovanni" Aragona ("Respondent"), and hereby request an extension of time to commence judicial review of the decision of the Trademark Trial and Appeal Board (the "Board") in Cancellation Number: 92057023 (the "Cancellation"). 37 C.F.R. § 2.145(e).

If a written request to extend the time for appeal is filed before the expiration of the appeal period, the Director may grant the request on a showing of good cause. The following constitutes good cause to grant such an extension:

During August and September, Respondent has been in the hospital undergoing a surgical procedure and is currently receiving on-going treatment related to the same. Respondent is also in the process of finding additional or substitute representation to handle the appeal going forward. Respondent's current medical condition has prevented him from taking the steps necessary to finalize retaining new counsel. Further, once hired, new counsel will need sufficient time to review the evidentiary record and the legal conclusions of the Board, determine the appropriate action in respect to judicial review of the Board's decision, and determine what additional facts not reflected in the record and in the Board's decision may be relevant upon such an judicial review.

The Board's decision was mailed on July 25, 2016. A request for extension of time must be filed within two months of a Board decision; that day fell yesterday, which was a Saturday. 37 C.F.R. § 2.145(d), (d)(ii)(2), (e). As this request is filed on September 26, 2016, it is timely filed.

Very truly yours,

Jamie N. Pitts, Esq.

# **EXHIBIT B**

## Dan Mullarkey

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**From:** Giovanni <giovanni@giovannissauces.com>  
**Sent:** Monday, November 28, 2016 5:17 PM  
**To:** Dan Mullarkey  
**Subject:** RE: Giovanni Appeal

Mr. Mullarkey:

Thank you for your consent, as you can imagine going pro se is not an easy task.  
Please direct all matters to me.  
Giovanni

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**From:** Dan Mullarkey [<mailto:DMullarkey@Polsinelli.com>]  
**Sent:** Monday, November 28, 2016 2:20 PM  
**To:** Giovanni  
**Cc:** Jay Guiliano  
**Subject:** RE: Giovanni Appeal

Dear Mr. Aragona,

Thank you for your email. We consent to your 30-day extension request.

Please also send us the list of materials you plan to designate for inclusion of the appendix under FCR 30(b). We want to ensure that you comply with the requirements to number these documents well before your brief is due.

If you would like to discuss this procedure, please let me know. Also, please confirm that you are not represented by counsel in this matter and that we should directly contact you.

Best regards,

**Daniel Mullarkey**

*Associate*

[dmullarkey@polsinelli.com](mailto:dmullarkey@polsinelli.com)

202.626.8305

1401 Eye Street, NW, Suite 800  
Washington, DC 20005

[polsinelli.com](http://polsinelli.com)



Polsinelli PC, Polsinelli LLP in California

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**From:** Giovanni [<mailto:giovanni@giovannissauces.com>]  
**Sent:** Monday, November 28, 2016 1:25 PM  
**To:** Dan Mullarkey  
**Subject:** Giovanni Appeal

Daniel:

I am writing to request consent to a 30-day extension of time to file my brief. I would like the due date to be January 30, 2017 as I have previous events and travel in December planned well ahead of receipt of the new deadline.

Your consideration would be greatly appreciated.

Regards,  
Giovanni (John V. Aragona)

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This electronic mail message contains CONFIDENTIAL information which is (a) ATTORNEY - CLIENT PRIVILEGED COMMUNICATION, WORK PRODUCT, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW FROM DISCLOSURE, and (b) intended only for the use of the Addressee(s) named herein. If you are not an Addressee, or the person responsible for delivering this to an Addressee, you are hereby notified that reading, copying, or distributing this message is prohibited. If you have received this electronic mail message in error, please reply to the sender and take the steps necessary to delete the message completely from your computer system.

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# **EXHIBIT C**

## Dan Mullarkey

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**From:** Dan Mullarkey  
**Sent:** Monday, December 12, 2016 5:07 PM  
**To:** 'Giovanni'  
**Cc:** Jay Guiliano  
**Subject:** RE: Giovanni Appeal

Mr. Aragona,

I hope you are doing well.

We need to discuss the appendix for the appeal. We are willing to work with you and to help with the appendix, but it is your responsibility as Appellant to prepare the joint appendix. We should have a call to discuss this matter.

Further, we note you requested consent to extend your deadline to file your brief. We note that we have not seen anything filed with the Court. Please advise if you still plan on extending your deadline to file your brief.

We are generally available to discuss the appendix matter. Please let me know a convenient time in which we can speak.

Best regards,  
Dan

**Daniel Mullarkey**

*Associate*

[dmullarkey@polsinelli.com](mailto:dmullarkey@polsinelli.com)

202.626.8305

1401 Eye Street, NW, Suite 800

Washington, DC 20005

[polsinelli.com](http://polsinelli.com)



Polsinelli PC, Polsinelli LLP in California

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**From:** Giovanni [<mailto:giovanni@giovanissauces.com>]  
**Sent:** Monday, November 28, 2016 5:17 PM  
**To:** Dan Mullarkey  
**Subject:** RE: Giovanni Appeal

Mr. Mullarkey:

Thank you for your consent, as you can imagine going pro se is not an easy task.

Please direct all matters to me.

Giovanni

# **EXHIBIT D**



## Dan Mullarkey

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**From:** Dan Mullarkey  
**Sent:** Monday, February 06, 2017 5:47 PM  
**To:** 'Giovanni'  
**Cc:** Jay Guiliano  
**Subject:** RE: Extend

Mr. Aragona,

Our client will not consent to you request.

Best regards,  
Dan

### Daniel Mullarkey

*Associate*

[dmullarkey@polsinelli.com](mailto:dmullarkey@polsinelli.com)

**202.626.8305**

1401 Eye Street N.W., Suite 800  
Washington, D.C. 20005

[polsinelli.com](http://polsinelli.com)



Polsinelli PC, Polsinelli LLP in California

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**From:** Giovanni [<mailto:giovanni@giovannissauces.com>]  
**Sent:** Monday, February 06, 2017 5:41 PM  
**To:** Dan Mullarkey  
**Subject:** FW: Extend

Daniel:

Below is an email I sent you last Friday (although late in the day) and I apologize for that.

I was wondering if you had a chance to consider this request for me. As you can imagine, pro se is a very difficult position to be in, and with all the pain I've been in over the last couple of months, it's certainly been a challenge. Any consideration you can give me would be greatly appreciated, since I will be requesting the extension with the court tomorrow.

Thanking you in advance, I am,  
Sincerely,

Giovanni (John V. Aragona)

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**From:** Giovanni [<mailto:giovanni@giovannissauces.com>]  
**Sent:** Friday, February 03, 2017 4:58 PM  
**To:** 'dmullarkey@polsinelli.com'  
**Subject:** Extend

Daniel:

I am writing to ask if I still have your consent to an extension of time to file my brief. I would like to request an extension of 60 days due to the results of an MRI I received last week advising me of a tear in the muscle of my rotator cuff. I have gone for pre-op workups and since I have Type 2 diabetes, my A1C levels are not fit for the operation. It is 10.4 and they require a minimum reading of 7. I must be retested again on March 28th, then they can schedule the surgery.

Also, to answer the questions in your last email:

The list of materials I plan to designate for inclusion of the appendix under FCR 30(b): I am going to be filing a motion for leave under rule 24(c): "Leave to Use Original Record," requesting that the appeal be heard on the original record without reproducing any part.

Please let me know if I can file this request with your consent as well.

Lastly, I confirm that I am not represented by counsel and that you may contact me directly.

Your consideration would be greatly appreciated.

Regards,  
Giovanni (John Vv Aragona)

# **EXHIBIT E**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE DIRECTOR

LuckyU Enterprises, Inc., dba Giovanni's	)	
Original White Shrimp Truck,	)	
	)	
	)	Opposition to Request for Extension of
Petitioner,	)	Time to File an Appeal
	)	
v.	)	
	)	Cancellation No. 92057023
John "Giovanni" Aragona,	)	
	)	
Respondent.	)	

**OPPOSITION TO RESPONDENTS REQUEST FOR EXTENSION OF**  
**TIME TO FILE AN APPEAL**

Petitioner respectfully requests consideration of its opposition to Respondent's Request for Extension of Time to File an Appeal ("Request"). Petitioner was not served with a copy of the request by counsel for Respondent and was only notified of the Request upon receipt of the Memorandum and Order issued by the Director and thus did not have time to file its opposition prior to rendering of the Order.

Petitioner opposes this request because Petitioner has already been prejudiced by Respondent's significant delay in this matter. Respondent has repeatedly requested extensions on the eve of deadlines which extended the opposition proceeding more than three years from the date of filing. This further delay, without sufficient support or basis, is not warranted. Petitioner will continue to be prejudiced by Respondent and his infringement of Petitioner's trademarks until this matter is finally concluded. Respondent's current delay tactic is just another request in a long history of such requests and allows Respondent to continue to infringe upon Petitioner's rights.

Two months is more than enough time to determine if there is any basis for appeal (which there is not). Nothing in the Request states any facts that would indicate Respondent was unable to make such a determination during that period. While Petitioner is sensitive to medical issues, there is no sworn statement as to the type of surgical procedure that would prevent instructing counsel to file an appeal within a two month time frame. Respondent is also in business with his wife, which is indicated in the record, and there is no indication that both Respondent and his wife underwent a surgical procedure in which neither could make a determination whether to appeal the Trademark Trial and Appeal Board decision within the two month time frame. Unfortunately, this behavior by Respondent is typical as evidenced by the case record.<sup>1</sup>

Petitioner also opposes the argument that Respondent is seeking new counsel in this case and thus delay is justified. Respondent has already made this argument to delay the case previously and on numerous occasions. No new counsel has ever entered an appearance and there has been no indication of any discussions with potential new counsel other than argument presented by current counsel. This is just another further delay tactic in a case that has been pending since April 8, 2013.

As noted above, Petitioner filed the Petition for Cancellation on April 8, 2013. The Board's decision was rendered more than three years later on July 25, 2016. During that lengthy period, Petitioner was constantly accommodating Respondent's requests for extensions due to any number of issues, such as the aforementioned "seeking of new counsel." Other extension requests were due to Respondent traveling to Europe and to seek consultation with a psychiatric rehabilitation counselor. The final straw was counsel for respondent's request for an indefinite

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<sup>1</sup> Respondent has used a medical excuse previously.

extension to file Respondent's Trial Brief when lightning struck and caused a power surge to destroy her computer (and her brief along with it) on the eve of her deadline. This caused a seven month delay in the case.

Petitioner is submitting various Board orders and Petitioner brief's filed throughout the course of the proceeding highlighting the numerous excuses submitted by Respondent. Petitioner requests that the Director take this previous activity under consideration.

September 30, 2016

/Daniel Mullarkey/  
Daniel Mullarkey  
Polsinelli PC  
1401 I Street, NW  
Suite 800  
Washington, DC 20005

Attorney for Petitioner